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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

On The Report Of The Special Master

**BRIEF OF THE WILDERNESS SOCIETY, SIERRA CLUB,
ALASKA WILDERNESS LEAGUE, NATIONAL AUDUBON
SOCIETY, PORCUPINE CARIBOU MANAGEMENT
BOARD, ALASKA CENTER FOR THE ENVIRONMENT,
NORTHERN ALASKA ENVIRONMENTAL CENTER AND
TRUSTEES FOR ALASKA AS *AMICUS CURIAE*
IN SUPPORT OF THE UNITED STATES OF AMERICA**

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**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

This case represents far more than a dispute between the United States and Alaska over who holds title to certain lands on Alaska's northern coast. Resolution of the issues before the Court will determine whether the last remaining intact Arctic ecosystem is preserved or is reduced to an industrialized landscape.

To bring to the Court's attention the impacts of its decision in this case, and exactly how those impacts relate to the legal arguments presented to the Court by the parties, seven non-profit environmental organizations and the Porcupine Caribou Management Board request leave to submit for the Court's consideration the attached Brief of *Amicus Curiae*. Since long before its establishment, movants have been vocal advocates for the Arctic Wildlife Range and the protection of the integrity of the Range -- now National Wildlife Refuge. These issues are central to questions

presented to the Court in this case, primarily to Question #10 concerning whether the boundary of the Range includes the disputed lands. Movants thus have an informed perspective and seek to "to bring[] to the attention of the Court relevant matter not already brought to its attention by the parties . . ." Supreme Court Rule 37.1.¹

As an initial matter, movants did not file a brief earlier in these proceedings as it did not appear from the original briefs on exceptions that the State of Alaska was going to take exception to the Special Master's recommendation on Question #10. See Brief for the State of Alaska in Support of its Exceptions at 5 n.4 (filed August 1996). This question was first excepted to by the State in its Reply Brief. See Alaska Reply Brief at 16 (filed October 1996). Thus, this is the first opportunity for movants to submit information to the Court on the primary question for which they have special expertise. See Supreme Court Rule 37.1 (an *amicus* brief which does not "bring to the attention of the Court relevant matter . . . burdens the Court, and its filing is not favored").

Movants' special expertise on the issues raised in this case concerning the Arctic National Wildlife Refuge is well documented and began long before the Range was established. In fact, as the Special Master notes, Olaus J. Murie, then-director of movants The Wilderness Society, was "the principal conservationist behind the Arctic Wildlife Range." Report of the Special Master (Report) at 486; see

¹The United States of America consented to the filing of the attached *Amicus Curiae* brief. The written consent has been filed with the Clerk pursuant to Supreme Court Rule 37.3. The State of Alaska, however, did not consent. Thus, pursuant to Supreme Court Rule 37.3(b), movants submit this Motion for Leave to File *Amicus Curiae* Brief.

also William O. Douglas, *My Wilderness* at 10 (1960) (discussing early 1950's scientific expedition into the Arctic with Olaus Murie); Debbie S. Miller, *Midnight Wilderness* 163-65 (1990) (discussing The Wilderness Society's role in establishment of the Arctic Wildlife Range).

The Sierra Club also played a central role in the establishment of the Range. In 1957, eight months before the federal Bureau of Sport Fisheries and Wildlife submitted its application for establishment of the Range to the Interior Department, see Report at 447 n.1, the Sierra Club sponsored a conference on, among other things, a "proposed arctic reserve." *Midnight Wilderness* at 172. As a result of meetings held at that Sierra Club conference between federal land-use agency representatives and conservationists, it was decided that "a proposed Arctic National Wildlife Range, under [United States Fish & Wildlife Service] administration" would be sought. *Id.* This is exactly what came to pass. See Report at 450 n.3 (quoting Public Land Order 2214 establishing Arctic National Wildlife Range, 25 Fed. Reg. 12,598 (1960)).

As detailed in the Brief of *Amicus Curiae*, a primary reason for the establishment of the Range was the protection of its incredible wildlife, including the internationally-important Porcupine Caribou Herd. Movant Porcupine Caribou Management Board is a joint Canadian and Native organization which has worked for over a decade to promote the conservation and protection of the Porcupine Caribou Herd and its habitat. In performing this function, the Board draws on the centuries-old expertise of its members concerning the caribou and the varied habitat upon which it depends.

All movants have long-standing records of participation in issues concerning the Arctic Wildlife Range,

now Refuge. For example, The Wilderness Society, Sierra Club, National Audubon Society, Alaska Center for the Environment, Northern Alaska Environmental Center and Trustees for Alaska all have been involved in extensive litigation concerning proposals to drill for oil in and near the Arctic National Wildlife Refuge and the impacts of such drilling on the environment and the Refuge. See, e.g., *Trustees for Alaska, et al. v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (concerning environmental impacts of drilling in Refuge); *Natural Resources Defense Council, et al. v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) (same); *Trustees for Alaska, et al. v. State*, 865 P.2d 745 (Alaska 1993) (impacts to environment, including the Refuge, of state oil and gas lease sale immediately offshore of the Refuge at Demarcation Point); *Trustees for Alaska, et al. v. State*, 851 P.2d 1340 (Alaska 1993) (impacts to the environment, including the Refuge, of state oil and gas lease sale immediately offshore of the Refuge in Camden Bay); *Trustees for Alaska, et al. v. State*, 795 P.2d 805 (Alaska 1990) (same).

Finally, movants, including those mentioned above and the Alaska Wilderness League, have been principal players in the debate concerning whether drilling should occur in the Arctic National Wildlife Range. See, e.g., Jimmy Carter, *Save Alaska -- Again*, N.Y. Times, May 18, 1995, Op-ed (former President Jimmy Carter is the Honorary Chair of the Alaska Wilderness League).

The special expertise movants have developed over the years relates directly to the Court's consideration of whether the boundary of the Refuge is a "single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths" as the Special Master recommends, Report at 495, or whether it follows the "sinuosities of the extreme low

water line along the mainland" including within the boundary only those "offshore bars, reefs, and islands that are above the line of extreme low water," as Alaska would have the Court decide. Reply Brief for the State of Alaska at 18. This is so because a primary reason movants advocated for establishment of the Range, and have fought so hard to protect it from drilling, was to ensure the continued existence of the incredible wildlife found within its area. As those who established the Range knew, and as detailed in the attached Brief, the disputed lands--the coastal lagoons and lands underlying navigable waters--are absolutely essential habitat for this wildlife and thus for the purposes for which the land was originally set aside as a Wildlife Range.²

Consequently, the Court should grant this Motion for Leave to File *Amicus Curiae* Brief.

Respectfully submitted,

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November 12, 1996

²Less directly, these same points are relevant to the Court's consideration of Question #9; whether the application for withdrawal and creation of the Arctic Wildlife Range effectively withheld from Alaska the disputed lands. *Movants* touch only briefly on this point.

TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. The Unique National Values of the Arctic National Wildlife Refuge Would Be Severely Threatened By Conveyance of Submerged Lands to the State	4
1. The Arctic National Wildlife Refuge and Its Nearshore Waters Are an Integrated Ecosystem of Tremendous National Significance	4
2. The National Values of the Arctic National Wildlife Refuge Are Threatened By Conveyance to the State	11
a. Extensive Oil Exploration, Development and Production Activities Will Occur	11
b. The Arctic National Wildlife Refuge Holds Extraordinary Wildlife, Wilderness, and Recreation Values Which Will Be Harmed By Oil Exploration and Development	13
B. To Protect The Paramount National Interest In Nearshore Lands Of The Arctic National Wildlife Refuge, This Court Should Conclude That The Refuge Encompasses the Disputed Submerged Lands	23
1. The Disputed Submerged Lands Are Within the Refuge Boundary	23
2. The United States Retained Ownership Of The Submerged Lands Within The Boundaries Of The Arctic National Wildlife Refuge	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

<i>Alaska Pacific Fisheries v. United States</i> , 248 U.S. 78 (1918)	27, 28
<i>Andrus v. Charleston Stone Products Co.</i> , 436 U.S. 604 (1978)	26
<i>California, ex rel. State Lands Comm'n v. United States</i> , 457 U.S. 273 (1982)	26
<i>Coosaw Mining Co. v. South Carolina</i> , 144 U.S. 550 (1892)	26
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	28
<i>Trustees for Alaska v. State</i> , 795 P.2d 805 (Alaska 1990)	19
<i>Trustees for Alaska, et al. v. State of Alaska</i> , <i>Department of Natural Resources</i> , 865 P.2d 745 (Alaska 1993)	11
<i>United States v. Grand River Dam Authority</i> , 363 U.S. 229 (1960)	26
<i>United States v. Union Pacific R. Co.</i> , 353 U.S. 112 (1957)	26
<i>Utah Division of State Lands v. United States</i> , 482 U.S. 193 (1987)	27
<i>Watt v. Western Nuclear, Inc.</i> , 462 U.S. 36 (1983)	26

STATUTES

Alaska National Interest Lands Conservation Act 16 U.S.C. § 688dd	6
16 U.S.C. § 3101 <i>et seq.</i>	6, 12
Submerged Lands Act, 43 U.S.C. § 1301 <i>et seq.</i>	25, 27

ADMINISTRATIVE and
LEGISLATIVE MATERIALS

Federal Register

23 Fed. Reg. 364 (1958)	5
25 Fed. Reg. 12,598 (1960)	5
58 Fed. Reg. 12,454 (1993)	13
60 Fed. Reg. 9428 (1995)	13

Hearings

102d Cong., 1st Sess. 303 (1991) (testimony of Jack Lentfer)	17
---	----

Administrative Documents

Federal Outer Continental Shelf Oil and Gas Lease Sale 71, Final EIS	16
Federal Outer Continental Shelf Oil and Gas Lease Sale 91, Final EIS	16
Final Finding and Decision of the Director, State of Alaska Oil and Gas Lease Sale 50 (April 30, 1987).....	12, 13, 16, 17, 19, 20
Final Finding of the Director, State of Alaska Oil and Gas Lease Sale 36	15

State of Alaska, Division of Oil and Gas, Five Year Oil and Gas Leasing Program, Beaufort Sea Areawide Lease Sales 1999, 2000, 2001 (July 1996).....	11
M. Spindler, U.S. Fish and Wildlife Service, Bird Populations in Coastal Habitats, Arctic National Wildlife Range, Alaska (1979)	10, 20
U.S. Department of the Interior, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement (1987).....	passim
U.S. Fish and Wildlife Service, A Preliminary Review of the Arctic National Wildlife Refuge, Alaska Coastal Plain Resource Assessment: Report and Recommendation to the Congress of the United States and Final Legislative Environmental Impact Statement (1995)	9, 16
U.S. Fish and Wildlife Service, Arctic National Wildlife Refuge, Coastal Plain Resource Assessment--Final Report: Baseline Study of the Fish, Wildlife, and Their Habitats, vol. II (1986)	7, 21
U.S. Fish and Wildlife Service, Final Arctic National Wildlife Refuge Comprehensive Conservation Plan, EIS, Wilderness Review, and Wild River Plans (1988)	8
U.S. Fish and Wildlife Service, Fish Population Characteristics of Arctic National Wildlife Refuge Coastal Waters (1988)	17

BOOKS and PUBLICATIONS

Books

George Collins, <i>The Art and Politics of Park Planning and Preservation</i> (1980)	18, 23
William O. Douglas, <i>A Wilderness Bill of Rights</i> (1965).....	22
William O. Douglas, <i>My Wilderness</i> (1960).....	2, 4
Debbie S. Miller, <i>Midnight Wilderness</i> (1990).....	4

Law Reviews

Collins, <i>Background Information for Use in Connection With a Proposal for an International Wildlife Range</i> , 6 U.B.C. L. Rev. 3 (1971).....	4
Findlay, <i>History and Status of the Arctic National Wildlife Range</i> , 6 U.B.C. L. Rev. 15 (1971).....	4

Miscellaneous Articles

K.H. Dunton, <i>An Annual Carbon Budget for an Arctic Kelp Community, Alaskan Beaufort Sea</i> (1984)	9
International Porcupine Caribou Management Board, <i>Sensitive Habitats of the Porcupine Caribou Herd</i> (January 1993).....	14
T. Kizzia, <i>Confrontation in the North, Defenders</i> , Sept./Oct. 1987.....	10, 19
L. Lowry and K. Frost, <i>Foods and Feeding of Bowhead Whales in Western and Northern Alaska</i> , 35 Sci. Rep. Whales Res. Inst. (1984)	19

Brian O'Donoghue, <i>Oil Development Slows Caribou Births--Studies</i> , Fairbanks Daily News Miner, August 17, 1995	15
Penny Rennick, ed., <i>Arctic National Wildlife Refuge</i> , Alaska Geographic, Vol. 20, No. 3 (1993)	4
Steve Rhinehart, <i>Oil Field Caribou Decline; State finds fewer in Arctic herd</i> , Anchorage Daily News, October 21, 1995	15
David Whitney, <i>Alaska Counts on Court</i> , Anchorage Daily News, April 26, 1996	11

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**INTRODUCTION AND INTEREST OF
AMICI CURIAE**

No place in America, and perhaps the world, rivals the Arctic National Wildlife Refuge for its combination of awesome scenic beauty and its critical biological importance to the millions of animals who migrate through and across its landforms. This one place forms the locus of a web of life whose strands reach quite literally around the planet. It is a primeval wilderness of unparalleled vastness and abundance.

The Arctic has a strange stillness that no other wilderness knows. It has loneliness too -- a feeling of isolation and remoteness born of vast spaces, the rolling tundra, and the barren domes of limestone mountains. This is a loneliness that is joyous and exhilarating. All the noises of civilization have been left behind; now the music of the wilderness can be heard. The Arctic shows beauty in this barrenness and in the shadows cast by clouds over empty land. The beauty is in part the glory of seeing moose, caribou

and wolves living in natural habitat, untouched by civilization. It is the thrill of seeing birds come thousands of miles to nest and raise their young.

...

The Arctic has a call that is compelling. The distant mountains make one want to go on and on over the next ridge and over the one beyond. The call is that of a wilderness known only to a few. This is not a place to possess like the plateaus of Wyoming or the valleys of Arizona; it is one to behold with wonderment. It is a domain for any restless soul who yearns to discover the startling beauties of creation in a place of quiet and solitude where life exists without molestation by man.

William O. Douglas, *My Wilderness* 9-10 (1960).

The Arctic Refuge and its wild inhabitants, until now having avoided the encroachment of industrial development, are in great jeopardy. The State of Alaska plans to move forward with oil exploration within or on the edge of the Refuge if its claim to submerged lands in this case is granted. Those plans endanger the wilderness and wildlife of the Refuge, including the spectacular Porcupine Caribou Herd. The Refuge and its submerged lands so critical to wildlife belong to the American people and must be protected as a part of our great national heritage.

This brief is submitted on behalf of organizations whose collective mission is to protect nature from the most serious threats it faces. The instant litigation is a thin veil holding in abeyance what is undoubtedly the greatest single threat now facing this last vestige of America's wild lands. On behalf of more than one million Americans who have

joined together in defense of the national heritage, the named organizations submit this brief as *amici curiae* in support of the United States. A fuller statement of *amici's* interest is found in the accompanying Motion for Leave to File *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

1. The Arctic National Wildlife Refuge is a unique area of unparalleled value to the American public. Its nearshore and offshore disputed lands are central to the continued healthy functioning of the Refuge and to the values the United States intended to preserve when it retained the area, which include wildlife, recreation and wilderness. Federal ownership of the lands is necessary to protect that national public interest and fulfill the very purposes for which the lands were retained.
2. Ownership of the disputed lands by the State of Alaska and concomitant oil exploration activities would impair the wildlife, wilderness, and recreation values which the United States sought to protect in creating the Refuge.
3. The Range boundary drawn by the United States reflected consideration of the national values embodied in the area and included the disputed lands. To protect the national interest in these lands and serve the purposes of their inclusion within the Refuge, the grant of lands to Alaska at statehood must be interpreted to exclude the disputed lands.

ARGUMENT

A. The Unique National Values of the Arctic National Wildlife Refuge Would Be Severely Threatened By Conveyance of Submerged Lands to the State.

1. The Arctic National Wildlife Refuge and Its Nearshore Waters Are an Integrated Ecosystem of Tremendous National Significance.

Explorers have been leading expeditions to the Arctic coast since the 1920s. Findlay, *History and Status of the Arctic National Wildlife Range*, 6 U.B.C. L. Rev. 15 (1971). Renowned scientists and conservation leaders such as Olaus and Mardy Murie, A. Starker Leopold, Robert Marshall and Justice William O. Douglas visited the area and returned with glowing reports of its biological diversity and outstanding scenery.¹ As news of the incredible beauty and diverse wildlife in this portion of the Arctic spread, a movement arose to preserve the unique natural values of the area.

In 1957, the groundswell of public support for preserving a large block of the public lands in northeastern Alaska culminated in the Bureau of Sport Fisheries and Wildlife's application to the Secretary of Interior for an order withdrawing 8.9 million acres of land "to establish an Arctic Wildlife Range . . . for the preservation of the wildlife and

¹ See, e.g., *id.*; William O. Douglas, *My Wilderness* 9-31 (1960); Penny Rennick, ed., *Arctic National Wildlife Refuge*, Alaska Geographic, Vol. 20, No. 3 (1993); Debbie S. Miller, *Midnight Wilderness* 161-81 (1990); George Collins, *Background Information For Use In Connection With A Proposal For An International Wildlife Range*, 6 U.B.C. L. Rev. 3, 9 (1971).

wilderness resources of that region." Report of the Special Master [hereinafter Report] at 447 n.1, *quoting* Application for withdrawal by public land order, November 18, 1957, *see also* 23 Fed. Reg. 364 (1958) (public notice of application). In 1960, the Secretary issued Public Land Order 2214, withdrawing the land and establishing the Arctic Wildlife Range. 25 Fed. Reg. 12,598 (1960). In a statement of justification for the Range, dated November 7, 1957, D.H. Janzen, director of the Bureau of Sport Fisheries and Wildlife, stated:

The portion of the Arctic plain included in the proposal is a major habitat, particularly in summer, for the great herds of Arctic caribou, and the countless lakes, ponds and marshes found here are nesting grounds for migratory waterfowl . . .

The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales . . .

This unmodified region is important for game management research, particularly on caribou range problems.

The proposed Arctic Wildlife Range offers an ideal opportunity, and the only one in Alaska, to preserve an undisturbed portion of the Arctic large enough to be biologically self-sufficient. It would comprise one of the most magnificent wildlife and wilderness areas in North America . . .

U.S. Ex. 9.

In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) which, among other things, enlarged the Range to 19 million acres and changed its name to the Arctic National Wildlife Refuge. 16 U.S.C. § 688dd. In ANILCA, Congress also designated all but 1.5 million acres of the original Range as Wilderness. 16 U.S.C. § 1132. The remaining 1.5 million acres, located along the coastal plain, were "withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws." 16 U.S.C. § 3142(i). Importantly, Congress also provided in ANILCA that:

Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress.

16 U.S.C. § 3143. Congress has not authorized any such development.²

Protection of this area by Congress is not surprising. No other park or preserve can match the primitive and intact ecosystem of the Arctic Refuge. Not Yellowstone with its edgy diversity of megafauna, not the Everglades with its enormous biological productivity, not the Grand Canyon with its still-life splendor. Indeed, the Refuge "is one of the more primitive and isolated wild land regions *left on earth* that has been afforded protection as a conservation area."³

² Of the 1,100 miles of Alaskan shoreline along the Beaufort and Chukchi Seas, only the approximately 150 miles of Arctic Refuge coastline remains off-limits to oil and other mineral development.

³U.S. Fish and Wildlife Service, Arctic National Wildlife Refuge, Coastal Plain Resource Assessment--Final Report: Baseline Study of the Fish,

The perennially snow-capped, 9,000-foot peaks of the Brooks Range bisect the Refuge from east to west. Their northern slopes meld into a fifteen to forty mile wide coastal plain which leads to the island-studded coast of the Beaufort Sea. The mountains produce snow melt during virtually the entire spring and summer, so much so that eighteen major rivers flow from the Brooks Range to the Beaufort Sea. The coastal plain is tundra, with shin-high communities of mosses, lichens, dwarf shrubs, berry plants and wildflowers. There are no trees on the coastal plain; none can endure the winter's cold or months-long darkness. The tundra is underlain by permafrost only a few feet down, so that surface water does not percolate, but instead flows gently through the tussocks toward the Beaufort Sea.

Wildlife is ubiquitous during the summer. Meandering across the tundra are customarily found thousands of caribou. See App. 1 (photograph of Porcupine Caribou Herd). The world-renowned Porcupine Caribou Herd, 152,000 strong, migrates approximately 2,700 miles annually. Every April, the Herd begins its long walk to the coast, where the blooming tundra provides a high-calorie, high-protein source of nutrition that is particularly essential to cows during the early-summer calving season. The caribou's chief antagonist is the mosquito, billions of which virtually explode from the moist earth every June and whose prime source of food is the caribou. Because this represents a serious health threat, the caribou go to great lengths to deflect the insect assault. Their chief defense against the mosquito is to seek coastal waters. Near-complete submersion in seawater is the best defense. This makes the

Wildlife, and Their Habitats, vol. II, 481 (1986) (emphasis added) [hereinafter Baseline Study].

lagoons and barrier islands the "insect relief habitat" of choice. *See infra* p.14; App. 2 (map).

Other wildlife species that are found in great abundance include muskoxen, grizzly bears, wolves and Arctic foxes. Wolverine, marmot, voles, lemmings, weasels, and dozens of other mammal species join the tapestry of wildlife that make the coastal plain the most highly valued wildlife preserve on the continent.

The Coastline and Beaufort Sea Lagoons

The Arctic National Wildlife Refuge is the nation's only conservation area that protects a complete spectrum of Arctic ecosystems. From the high peaks of the Brooks Range and foothills, the coastal plain sweeps down to the coastal lagoons fringed by barrier islands at the Beaufort Sea coast. The lagoons are an integral part of this ecosystem. From its early beginnings, the Refuge was established "out of a concern for the wilderness ecosystem of northern Alaska as a whole." U.S. Fish and Wildlife Service, Final Arctic National Wildlife Refuge Comprehensive Conservation Plan, EIS, Wilderness Review, and Wild River Plans 49 (1988). During a visit to the coastal plain in the early 1950s George Collins, a government researcher and surveyor, found "a magnificent place of beauty . . . that comes largely from being part of a much larger, varied and interconnected natural system." U.S. Fish and Wildlife Service, A Preliminary Review of the Arctic National Wildlife Refuge, Alaska Coastal Plain Resource Assessment: Report and Recommendation to the Congress of the United States and Final Legislative Environmental Impact Statement 7 (1995) [hereinafter FWS 1995 Report].

The Refuge's coastal plain, including its intricate system of lagoons, is the "most biologically productive part of the refuge and the heart of wildlife activity." *Id.* at 19. This biological richness is due to a unique proximity of the mountains to the coast and a greater landscape diversity than any other part of Alaska's coastal plain.

The coastal lagoons are an essential part of a broader web of life of the Refuge's coastal plain. One of the most important values of the lagoon habitat is the respite from mosquitoes it provides for the Porcupine Caribou Herd. Polar bears regularly den in such places as the Pokok Lagoon bluffs, Camden Bay area, and Canning River delta lagoons. U.S. Department of Interior, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement 30, Plate 1E (1987) [hereinafter FLEIS]. "The brackish lagoons provide migratory corridors for anadromous fish and are extremely important feeding areas for these species," such as Arctic Char and Arctic Cisco. FLEIS at 34. In the lagoons the submerged floor creates a highly-textured, gravelly or rocky surface that supports tremendously active communities of algae, kelp, and invertebrates such as chitons, anemones, and sponges which provide the foundation for the food chain. K.H. Dunton, *An Annual Carbon Budget for an Arctic Kelp Community*, The Alaskan Beaufort Sea 311-25 (P. Barnes, et al. eds., 1984). Clouds of migratory birds come to the lagoons to feast on concentrations of fish found there, and

remove the energy embodied in the lagoons to distant parts of the world.⁴

This far above the Arctic Circle, the sun shines constantly in the short summer and not at all in the winter. The twelve months of life in the Refuge that therefore must be lived in only four months result in an explosion of biological activity—in the lagoons and among the mosses, lichens, and wildflowers of the coastal plain. The products of this explosion are so valuable, ecologically speaking, that species have evolved with the ability and determination to travel whatever distance is necessary to partake of the riches, and to convey them elsewhere.

⁴M. Spindler, U.S. Fish and Wildlife Service, Bird Populations in Coastal Habitats, Arctic National Wildlife Range, Alaska 25 (1979) [hereinafter Bird Populations]. U.S. Ex. 54. One hundred and thirty-five species of waterbirds have been recorded on the Arctic Refuge's coastal plain. T. Kizzia, *Confrontation in the North*, Defenders, Sept./Oct 1987, at 18 [hereinafter *Confrontation in the North*]. The most impressive migration is undertaken by the Arctic Tern, which travels 10,000 miles from the Antarctic. Honorable mentions go to the Northern Wheatear, which migrates from southern Africa; Pectoral Sandpipers and Red Phalaropes (South America); Dunlin (Asia and California); and Brant (Mexico). The most numerous species include the Red-throated and Arctic Loons, Oldsquaw and Common Eider ducks. Of the several million birds that inhabit the Arctic Refuge for some period of the year, the vast bulk occupy the lands and waters in the vicinity of the Beaufort Sea lagoons. U.S. Ex. 44; U.S. Ex. 54.

2. The National Values of the Arctic National Wildlife Refuge Are Threatened By Conveyance to the State.

The State of Alaska has unequivocally declared its intent to lease the valuable nearshore submerged lands at issue here for oil and gas exploration and development as soon as 1999 if it prevails in its claim in this case.⁵ If this Court allows the State's claim to nearshore lands, oil exploration and development will cause severe and irreparable harm to the integrity of the Arctic National Wildlife Refuge.

a. Extensive Oil Exploration, Development and Production Activities Will Occur.

Exploration activities associated with drilling the submerged lands of the Refuge will include extensive surveys, likely to be conducted by helicopter or on the ice during winter, and seismic exploration. See, e.g., FLEIS at 83. Then, large scale exploratory drilling would occur. *Id.* at 84.

Development and production activities are even more invasive and extensive than exploration activities. Major

⁵See State of Alaska, Division of Oil and Gas, Five Year Oil and Gas Leasing Program, Beaufort Sea Areawide Lease Sales 1999, 2000, 2001 (July 1996) (sales include disputed submerged lands); David Whitney, *Alaska Counts On Court*, Anchorage Daily News, April 26, 1996, at A-1 (Alaska Attorney General states that the Special Master's finding concerning the Refuge, "if upheld . . . would allow the state to let oil companies lease near the edge of the [R]efuge's coastal plain"). See also *Trustees for Alaska, et al. v. State of Alaska, Department of Natural Resources*, 865 P.2d 745, 751 n.8 (Alaska 1993) (Demarcation Point) (noting industry interest in drilling the Refuge).

projects associated with production of oil on Alaska's North Slope include:

central production facilities, drilling pads, roads, airstrips, pipelines, water and gravel sources, base camps, construction camps, storage pads, powerlines, powerplants, support facilities and possibly a coastal marine facility.

FLEIS at 87; *see also* Final Finding and Decision of the Director, State of Alaska Oil and Gas Lease Sale 50 (Camden Bay) at 52-54, 56 (April 30, 1987) [hereinafter Alaska Offshore Oil Decision]. Exploratory and development drilling could be conducted in the lagoons themselves. *See* Alaska Offshore Oil Decision at 49-50. This drilling would occur over one or more seasons, and entails construction of roads and airstrips, often made with ice, and possibly artificial gravel islands. *See id.* at 49-53; FLEIS at 84.

If successful in its claim, the State of Alaska may seek to invoke Title XI of the Alaska National Interest Lands Conservation Act to gain access to its land across the Refuge. 16 U.S.C. § 3170(b). If Title XI access is obtained, the actual reach of development would extend beyond the submerged lands and include roads and other transportation systems, pipelines and other infrastructure on the coastal plain of the Refuge, spanning the area from development sites in the lagoons to the existing transportation systems to the west at Prudhoe Bay.

Exploration, development, and production phases generate significant amounts of wastes. For example, drilling activities typically result in the discharge of an average of 14,000 barrels of drilling fluids and cuttings per

well in Cook Inlet, Alaska. *See* 60 Fed. Reg. 9,428, 9,440 (1995). The United States Environmental Protection Agency has recognized that drilling wastes pose real threats to the marine and aquatic environments:

Discharged drilling fluids and drill cuttings are shown to cause contamination of sediments with heavy metals and hydrocarbons up to 4000 meters from the platforms. . . . Produced water discharges are shown to cause contamination of sediments with metals and . . . hydrocarbons up to 1000 meters from the platforms.

58 Fed. Reg. 12,454, 12,493 (1993) (EPA offshore oil and gas effluent rule). Traditionally, offshore and coastal area drilling rigs in Alaska have discharged these wastes directly into the surrounding waters. *See, e.g., id.*; *see also* Alaska Offshore Oil Decision at 55-56.

**b. The Arctic National Wildlife Refuge
Holds Extraordinary Wildlife,
Wilderness, and Recreation Values
Which Will Be Harmed By Oil
Exploration and Development.**

The wildlife resources, wilderness values and recreational opportunities of the last remaining intact ecosystem on America's Arctic coast are unique and irreplaceable. All of these facets of the Arctic National Wildlife Refuge face severe threats from oil exploration, development and production activities.

Wildlife

Focusing first on the most visible wildlife presence in the coastal area, oil development of submerged lands would

threaten the vast, internationally significant Porcupine Caribou Herd. The coastal plain and lagoons, barrier islands and river deltas provide critical habitat for the highly migratory Herd. FLEIS at 25. During calving on the coastal plain, "[a]dult females are at the lowest ebb of their physical condition" and "no alternative habitats are apparently available." International Porcupine Caribou Management Board, Sensitive Habitats Of The Porcupine Caribou Herd 14 (January 1993) [hereinafter Sensitive Habitats]. During the post-calving period the Porcupine Caribou aggregate in large numbers on the coastal plain, and in particular in the lagoons and on barrier islands seeking relief from the insects which continually harass the caribou. FLEIS at 25; Sensitive Habitats at 17; *see also* Apps. 1 & 2.

One need only envision a drill rig and associated facilities in or near the Beaufort lagoons to understand that this habitat would be significantly degraded such that the Porcupine Caribou, which now use the area by the thousands, would be adversely affected. *See* App. 1. During the post-calving period "[f]ree movement of these large groups is critical [and] [c]ow/calf groups are relatively intolerant to disturbance." Sensitive Habitats at 17. "[I]f caribou are delayed or prevented from free access to insect-relief habitat, the result may be deterioration in body condition with consequences of decreased growth, increased winter mortality, and lowered herd productivity." FLEIS at 22.

Oil development activities in or near caribou habitat can adversely affect caribou. *See* FLEIS at 120 (noting three kilometer "sphere of influence" on caribou from industrialized areas). This fact has been amply demonstrated with the Central Arctic Caribou Herd which inhabits land

around oil development facilities at Prudhoe Bay, located on Alaska's North Slope to the west of the Refuge:

studies of distribution and movements of the Central Arctic Caribou Herd . . . show that the animals tend to avoid the Prudhoe Bay complex, the Trans Alaska Pipeline, and the associated roads.

Final Finding Of The Director, State of Alaska Oil And Gas Lease Sale 36, 16 [hereinafter Sale 36 Finding]. Caribou populations can be negatively affected by "the cumulative effect of displacement and disturbance from" oil exploration, development and production. Sale 36 Finding at 33. This could, "in the long run, depress population levels."⁶ The Department of Interior concluded that the effects of drilling for oil on the coastal plain of the Refuge on the Porcupine Caribou Herd would be "major." FLEIS at 166.

In addition to impacts from the presence of development itself, caribou are also particularly sensitive to the inevitable oil spills. In examining the environmental impacts of offshore oil and gas lease sales near the Arctic National Wildlife Refuge, the United States noted that:

Caribou sometimes frequent barrier islands and shallow coastal waters during periods of heavy insect harassment and may become oiled or may ingest contaminated vegetation. Toxicity studies of crude oil ingestion in cattle indicate that anorexia, significant weight loss, and aspiration pneumonia leading to death are possible adverse effects of oil

⁶Sale 36 Finding at 33; *see also* Brian O'Donoghue, *Oil Development Slows Caribou Births--Studies*, Fairbanks Daily News-Miner, August 17, 1995, at A1; Steve Rhinehart, *Oil Field Caribou Decline; State finds fewer in Arctic herd*, Anchorage Daily News, October 21, 1995, at A1.

ingestion in caribou. These possible effects could increase mortality rates of caribou that interact with oil pollution.⁷

Polar bears also will be adversely affected by drilling of the submerged lands. Most, if not all, of the submerged Refuge lands in dispute in this case are known polar bear denning habitat. FLEIS at 129; Alaska Offshore Oil Decision at 16-17. Indeed, the most important land denning area in Alaska is a coastal strip in the Arctic Refuge. FWS 1995 Report at 7. Generally, polar bears reside on floating pack ice except while denning. Alaska Offshore Oil Decision at 16. Polar bears will move into nearshore areas in early fall to den in shorefast ice and snowdrifts on barrier islands and the coastal plain. *Id.* at 17. Cubs are born in mid-winter and emerge from the dens with their mothers in March or April to head out to the pack ice. *Id.*

"Polar bears are particularly sensitive to human activities during the denning period." FLEIS at 129. If disturbed during denning, polar bears will usually abandon their dens, which can be fatal to cubs unable to travel with their mothers. *Id.* Disturbance during denning is particularly problematic because "mortalities of female polar bears are now about the maximum the Beaufort Sea population can sustain without a decrease in population levels." *Id.* at 130 (citation omitted). Potential sources of disturbance include

⁷Federal Outer Continental Shelf Oil And Gas Lease Sale 71, final EIS at 185; *see also* Federal Outer Continental Shelf Oil And Gas Lease Sale 91, final EIS at IV-B-70, IV-B-74 (detailing potential effects of oil spills on Porcupine Caribou Herd).

"aircraft, ships, road construction and traffic, pipelines, seismic work, drilling, and oil transport activities."⁸

Increased human-bear encounters can also be expected if drilling and associated activities occur, resulting in an increase in the number of bears shot and killed. Lentfer Testimony. Oil and other contaminants can directly harm and kill polar bears through spills or direct ingestion, or indirectly harm and kill them, through contamination of the food chain upon which polar bears rely. Lentfer Testimony; FLEIS at 130; Alaska Offshore Oil Decision at 17.⁹

The coastal areas are also extremely important for coastal and freshwater fish and other marine species. These areas are important because they are relatively warmer than the offshore Beaufort Sea waters and their brackish waters are rich in food organisms. *See* U.S. Fish and Wildlife Service, Fish Population Characteristics of Arctic National Wildlife Refuge Coastal Waters 1 (1988).

The importance of the lagoons as a feeding area for fish was recognized in the early 1950s by government

⁸*Arctic National Wildlife Range, 1991: Hearings on HR 1320 and 759 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 102d Cong., 1st Sess. 303, 304 (1991) (testimony of Jack Lentfer) [hereinafter Lentfer Testimony] (Mr. Lentfer is the former head of the polar bear research and management programs for both the Alaska Department of Fish and Game and the U.S. Fish and Wildlife Service.)*

⁹Mr. Lentfer "do[es] not believe the effects of [oil and gas exploration and development on polar bears] can be mitigated," Lentfer Testimony at 303, and notes that it is "important to recognize that the[] effects would be cumulative and that the overall effect would be even more severe if similar impacts resulted from exploration and development activities elsewhere along the Alaskan and Canadian Beaufort coast." *Id.* at 304

researchers, including those who ultimately drew the boundaries for the Arctic Wildlife Range:

the accretion lands are in the forms of reefs offshore, along the Arctic coast--miles and miles of thin thread-like reefs that stick up, gravel bars, with the water between them and the mainland. The mainland tundra plains reach back to the mountains, and the sun comes out and melts the ice and snow in the spring, and the waters flow down at tremendous speed in those north-flowing rivers, fifty of them or so, and into those lagoons between the reef and the shore, the water becomes virtually potable.

You have freshwater types of fish that come out of those mountains and go down into the lagoons and mature. Part of their lifecycle depends upon this flushing out and the utilization of this reef system, with the lagoons behind them, as against the ocean waters and the intense masses of ice offshore, far out.

George Collins, *The Art and Politics of Park Planning and Preservation* 192 (1980) (history of early 1950s research and surveys of the Arctic) [hereinafter *Park Planning*].

Sixty-two species of fish are found in the coastal waters of the Beaufort Sea, FLEIS at 34, and thirty-six species inhabit the rivers and lakes of the Refuge. The Arctic Char, Arctic Cisco, and the Arctic Grayling are anadromous fish that spend nine months of the year in upland river habitat; during the summer they move to nearshore coastal waters for intensive feeding. Roughly ninety percent of the yearly feeding done by these fish is conducted in the warm brackish waters of the shallow estuarine "mixing zone" where coastal plain rivers empty

into the Beaufort Lagoon and Beaufort Sea. Fish populations can be harmed by changes in habitat caused by oil activities, such as obstacles to free fish passage. FLEIS at 136-37.

The endangered Bowhead whales off the Alaskan coast number approximately 8,000. Probably the most critical portion of the Bowhead's annual migration is the few months spent off the coast of the Arctic Refuge (from Barter Island to the Canadian border), where they feed off the high-calorie zooplankton created in the Beaufort lagoon's estuaries.¹⁰ Offshore support facilities, including the construction and presence of a gravel causeway to transport oil from the submerged lands west to Prudhoe Bay, see *Trustees for Alaska v. State*, 795 P.2d 805, 810 (Alaska 1990) (discussing transportation options for state oil and gas lease offshore of the Refuge), could have severe impacts on Bowhead whales. See, e.g., Alaska Offshore Oil Decision at 49-50 (noting importance of restricting offshore activities during Bowhead whale migration).

Internationally important migratory waterfowl and shorebirds also concentrate in and near coastal lagoons and on barrier islands for nesting, feeding and staging. Alaska Offshore Oil Decision at 23. One hundred and thirty-five species of waterbirds have been observed on the Arctic Refuge's coastal plain. *Confrontation in the North* at 18. Of the millions of birds that inhabit the Arctic Refuge for some period of the year,¹¹ the vast bulk occupy the lands and waters in the vicinity of the Beaufort Sea lagoons. This is

¹⁰L. Lowry and K. Frost, *Foods and Feeding of Bowhead Whales in Western and Northern Alaska*, 35 Sci. Rep. Whales Res. Inst. 1-16 (1984).

¹¹Two species of duck alone--the Eider and the Oldsquaw--account for 1.5 million. U.S. Ex. 44.

due not only to the rich feeding materials found in the waters, but equally to the many different types of waterbird habitat that are located within proximity to the lagoons. Bird Populations at 25.

Activities which require the use of heavy equipment and repeated aircraft flights near the nests could disrupt nesting and resting birds. The effects of such disturbances could include loss of eggs, inability to feed and develop sufficient fat reserves, and abandonment of molting areas.

Alaska Offshore Oil Decision at 23 (citation omitted); see also FLEIS at 131-32. Nearshore facilities could also adversely affect tundra swans and the hundreds of thousands of snow geese which use the coastal plain, lagoons and barrier islands. FLEIS at 133.

As the *Exxon Valdez* oil spill amply demonstrated, direct contact with oil spills by birds is usually fatal. Alaska Offshore Oil Decision at 23. This is "particularly [true] in lagoons where waterfowl congregate in large numbers." FLEIS at 132. Oiled birds die from hypothermia, shock, or drowning. Alaska Offshore Oil Decision at 23. Hydrocarbon and other contaminants can also be ingested, either directly through preening or indirectly through consumption of contaminated foods. This can lead to "reduce[d] reproductive ability" and "chronic toxicity." Alaska Offshore Oil Decision at 23.

Wilderness and Recreation

The coastal plain of the Refuge "has outstanding wilderness qualities: scenic vistas, varied wildlife, excellent opportunities for solitude, recreational challenges, and scientific and historic values." FLEIS at 46.

The coastal plain study area is primeval land and offers excellent opportunity for solitude, which is further enhanced by the wilderness status of the land immediately south and east and the Arctic Ocean to the north of the area. There are no roads in the area or designated trails for wilderness travelers, but most travel occurs along river courses. However, even in close proximity to another party, the meandering shape of stream valleys provides adequate opportunity for seclusion.

In traveling by primitive means across the coastal plain, the visitor experiences true solitude and wilderness. Such experience is reminiscent of the hardship, challenge, drama, and peril faced by the early American pioneers, but which is becoming increasingly difficult to experience today.

... A visitor can, within the span of a few days, go from the alpine zone of ice, snow and rock, to alpine meadows, and arctic tundra valleys. Leaving the mountains, one traverses tussock tundra foothills, braided river floodplains, and rolling tundra plains. Near the arctic coast, one encounters the flat thaw lake plain, and the coastal zone of wetlands, lagoons, barrier islands, and the ocean. This recreational variety is unavailable within such a short distance anywhere on the Alaskan north slope.

Baseline Study at 480.

One could hardly argue with the United States' conclusion that these values "would be destroyed by the addition of oil facilities." FLEIS at 144. The unique and spectacular esthetics of an unspoiled and vast land simply

cannot survive the erection of an oil drill, or the gash of an oil pipeline. Moreover, the

[n]oise and presence of oil-development facilities would not only eliminate the wilderness character in the [coastal plain] area, but there could also be some visual and sound intrusions in the designated Wilderness by activities and developments in the [coastal plain] area.

FLEIS at 144. The opportunity for scientists to study an undisturbed ecosystem would also be eliminated. *Id.*

Even if one were never to visit the Refuge, simply knowing that there exists in America one such place, where an entire ecosystem is left undisturbed from the hand of man, satisfies a need traced to the very soul. As Justice Douglas writes:

Most people have an interest in the preservation of wilderness even though they may be too old to backpack or have wholly different interests. . . . The very presence of a remote wilderness area that only a handful of people visit a year gives a new dimension to a nation. For it supplies an element of mystery and awe, a real sanctuary of a sort, a genuine frontier that man has not despoiled. In these things most citizens take pride.

People treasure our wilderness, as they treasure Mt. Everest, even when they are too frail to visit it. They get comfort and security too, from the realization that we still possess some of the original America as it was in the beginning.

William O. Douglas, *A Wilderness Bill Of Rights* 85 (1965).

B. To Protect The Paramount National Interest In Nearshore Lands Of The Arctic National Wildlife Refuge, This Court Should Conclude That The Refuge Encompasses the Disputed Submerged Lands.

1. The Disputed Submerged Lands Are Within the Refuge Boundary.

The extraordinary wildlife and wilderness values of the coastal plain, barrier islands, and offshore lagoons in particular, must be considered in determining the boundary of the Refuge. Relying on the plain meaning of the boundary description and noting that the United States' original justification for the Range included references to the "river bottoms" and the "seacoast" and the variety of animals that depend on that habitat, the Special Master determined that "the disputed lands—including lagoons, tidelands, and the tidal parts of rivers—are inside the boundary of the Range." Report at 499. Given the importance of the submerged lands and tidelands to the wildlife, wilderness and recreation values of the Refuge, tying its boundary strictly to the shore would defeat the purpose of its designation.

As the Special Master notes, at the time the application for establishment of the Alaska Wildlife Range was submitted, the evidence showed that the United States intended all disputed lands to be included. Report at 489-90 (Master's discussion of importance of disputed lands to wildlife of the Refuge). The very people who drew the boundary for the United States support this conclusion. See *Park Planning* at 177-200, see especially 192 (government researcher and surveyor George Collins, based on his surveys of the early 1950s, notes importance of coastal lagoons to ecology of area ultimately included within Arctic Wildlife

Range). The voluminous information gathered since that time underscores the essential character of the coastal lagoons and barrier islands to the integrity of the Range. See *supra* pp. 8-10, 14-21.

The central relevance of the purposes of the land designation as an aid in defining the boundary of the Range is supported by the Special Master's recommendations confirming the United States' ownership of submerged lands in the National Petroleum Reserve, Alaska (NPRA). Report at 364-65, 380. In making the NPRA boundary recommendation, the Special Master focused on the original purpose of the NPRA: reservation of underground petroleum resources. Report at 380. The Master concluded that to draw the boundary as the State suggested, excluding submerged lands, would defeat the purpose of the land designation in the first place, as it could effectively allow the State to access petroleum reserves set aside in the NPRA. See Report at note 68 and accompanying text.

With respect to the Arctic National Wildlife Refuge, the State of Alaska would have the Court define the Refuge's northern boundary to follow the "sinuosities of the extreme low water line along the mainland" including within the boundary only those "offshore bars, reefs, and islands that are above the line of extreme low water." Alaska Reply Brief at 18. As with the NPRA, such a ruling would defeat the purpose of the Refuge. The previous sections describe in detail how the submerged lands and associated waters sought by the State form the very heart of the biological core of the Refuge. It is here where caribou seek shelter from harmful insect attack, millions of migratory birds feed, anadromous fish mature, and plankton bloom to sustain the bowhead whale. These values would all be jeopardized by exclusion

from the Refuge and transfer to the State. The same can be said for the Refuge's unique wilderness and recreation values. These are the values the United States sought specifically to protect in establishing the Range. The Special Master's inclusion of the disputed submerged lands within the boundary of the Refuge must be affirmed if the reservation is to serve its purpose.

2. The United States Retained Ownership Of The Submerged Lands Within The Boundaries Of The Arctic National Wildlife Refuge.

The significant national values of the coastal area of the Refuge also support the United States' claims to ownership of the disputed submerged lands. Many, if not most, of the lands subject to this dispute are offshore submerged lands, the disposition of which is governed by the Submerged Lands Act. 43 U.S.C. 1301 *et seq.* These lands are those submerged under the shallow lagoons, between the edge of the mainland and the barrier islands and reefs offshore below the low tide line. The Special Master improperly concluded the reservation of these lands by the United States was ineffective because he misinterpreted section 6(e) of the Alaska Statehood Act. Even if the Special Master had doubts about the meaning of section 6(e), he should have applied the rule of construction that favors the national interest in interpreting federal grants. Proper application of the rule requires a conclusion that the United States effectively withheld the disputed offshore submerged lands from Alaska.

Because the enactment of the Submerged Lands Act was an exercise of the federal government's constitutional power to dispose of federal property, this Court has

concluded its grant of lands must be construed narrowly and in favor of the United States. See *California, ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285, 287 (1982). This conclusion applies the longstanding rule that statutory grants are to be "construed strictly in favor of the public, and whatever is not unequivocally granted is withheld." *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892). "[I]f there are doubts they are resolved for the government, not against it." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957) (citation omitted). This rule exists to protect the federal sovereign and the national interest in federal public lands from grantees claiming "more than what was expressly included," *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (citation omitted), and has been applied in a variety of circumstances to protect the national interest in certain lands. See *Andrus v. Charleston Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (applying the rule to a federal mining statute); *Grand River Dam Authority*, 363 U.S. at 235 (applying the rule to a statute granting rights to construct dams across nonnavigable streams); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (applying the rule to the Stock-Raising Homestead Act).

In this case, it is particularly appropriate and important to apply the rule of construction to the federal retention of the submerged lands of the Arctic National Wildlife Refuge. The submerged lands of the Refuge are of unparalleled public value. This national interest in the Refuge's submerged lands must be protected from too broad a construction of the federal grant in the Submerged Lands Act. The fundamental purpose of the Refuge would not be

served if the United States were to be denied federal ownership of the submerged lands.

That result also should apply to tidelands. Some of the disputed lands are tidelands (lands between low and high tide) and lands underlying inland navigable waters. These lands, too, can be retained by the United States, as recognized by the Submerged Lands Act, subject to the constitutional limitation that the reservation be for a public purpose, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200-01 (1987), and that the intent to retain ownership be apparent. See 43 U.S.C. § 1313(a).

In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court found that a federal reservation included title to submerged lands, even where no explicit reference to the lands was made. See also Report at 420. The federal government reserved "the body of lands known as Annette islands" to create an Indian reservation. Because the Tribe relied on the lands underlying navigable waters for sustenance and "could not sustain themselves from the use of the upland alone," the Court found the reservation to include the waters and submerged lands adjacent to the islands. *Alaska Pacific Fisheries*, 248 U.S. at 89. Thus, because accomplishment of the purpose for the federal reservation required the inclusion of submerged lands in the reservation, the Court construed the reservation to embrace those lands.¹²

¹²In *Montana v. United States*, 450 U.S. 544 (1981), a case involving inland waters not subject to the Submerged Lands Act, the Court confirmed the approach taken in *Alaska Pacific Fisheries*, though reaching a different conclusion because the purpose of the reservation did not require inclusion of lands under a river.

In the case of the Arctic National Wildlife Refuge, as the previous sections demonstrate, the fundamental purpose for the reservation--protection of the area's wildlife, the intact ecosystem, and the associated wilderness--would be destroyed if the submerged lands and lands underlying navigable waters were not included in the reservation. Many of the species of wildlife that inhabit the Refuge rely on these lands and waters for their survival, much as the Tribe in *Alaska Pacific Fisheries* relied on the submerged lands for theirs.

To ensure that the unique and fragile resources of the Arctic National Wildlife Refuge are protected as was intended by the original reservation and is necessary to safeguard the national interest, this Court must conclude that the disputed submerged lands are within the Refuge and owned by the United States.

CONCLUSION

As its name suggests, a primary reason the United States established the Arctic Wildlife Range was to preserve and protect the incredible wildlife present on the Range. The coastal lagoons and lands underlying navigable waters are essential to this wildlife.

A decision by this Court, therefore, that these lands belong not to the American people but to the State of Alaska, which desires immediately to exploit them through oil drilling, would eviscerate the very reason the Range was established in the first place and irrevocably change the supreme wilderness character of the area.

The central significance of the disputed lands to the unique and world-renowned wildlife and wilderness values of the Arctic National Wildlife Refuge lead to the conclusion

that the lands were not transferred to the State of Alaska at the time of Statehood. The Court should find that the lands were retained in federal ownership, thus rejecting the Special Master's recommendation on Question #9; and find that the boundaries of the Range included the disputed lands, thus adopting the Special Master's recommendation on Question #10.

Respectfully submitted,

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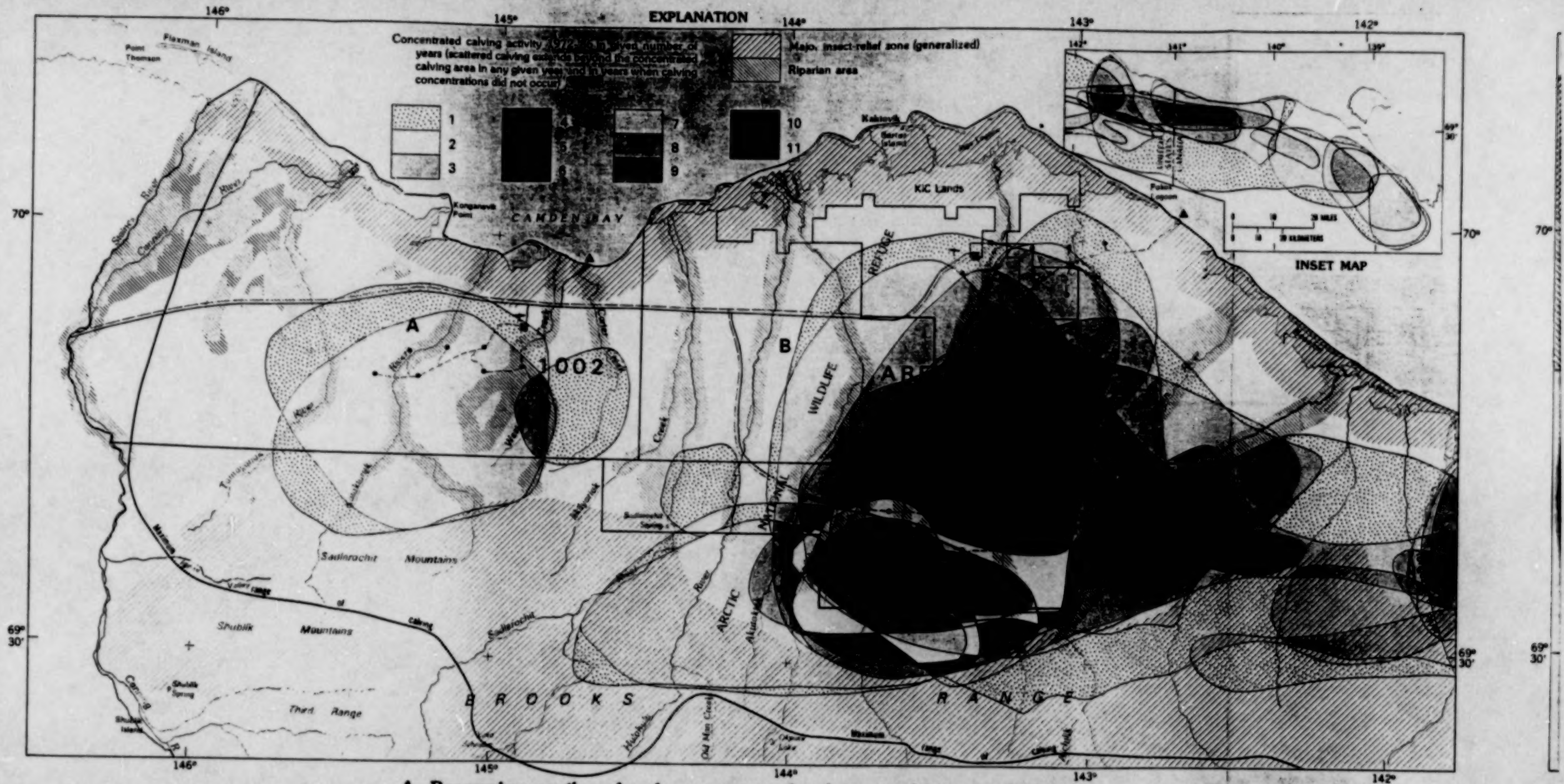
APPENDICES

App. 1 Photograph of Portion of Porcupine Caribou Heard
seeking relief form Mosquitos along Beaufort Sea lagoons.
Reprinted from D. Miller, Midnight Wilderness 23 (1990).





App. 2 U.S. Government map depicting coastal areas relied upon by caribou for insect relief. *Reprinted from* U.S. Dept. of the Interior, *Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement* (pocket) 1987.



A. Porcupine caribou herd concentrated calving and insect-relief areas